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No.

IN THE

Supreme Court of the United States

ROBERT KRILICH, PETITIONER

v.

UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, absent extraordinary circumstances, a district court lacks subject-matter jurisdiction to entertain a Section 2255 motion while a petitioner's direct appeal is pending?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert R. Krilich, Sr., petitions for a writ of certiorari to review the judgment of the Seventh Circuit in this case.

OPINIONS BELOW

The district court dismissed petitioner's 28 U.S.C. § 2255 motion to correct, vacate, or set aside his sentence in an unpublished order, pet. app. 1a-3a, and subsequently denied his request for a Certificate of Appealability ("COA") in an unpublished order. *Id.* 4a-7a. The court of appeals denied a COA in an unpublished order. *Id.* 8a-9a.

JURISDICTION

The court of appeals judgment was entered on May 18, 2005. A timely petition for rehearing was denied on October 28, 2005. Pet. App. 10a-11a. On January 16, 2006, Justice Stevens extended the time to file this petition to and including March 27, 2006. App. No. 05A640 Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

Title 28, Section 2255 of the United States Code provides, in pertinent part:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of-
>
> (1) the date on which the judgment of conviction becomes final;
>
> *****
>
> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain-
>
> (1) Newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

STATEMENT

Petitioner was convicted of racketeering and of making false statements to a bank. He was sentenced three times. Under the version of the Sentencing Guidelines in effect at the time of petitioner's conduct, his first sentence was calculated based on the amount of the "bribe or the benefit received, or to be received, in return for the bribe." U.S.S.G. § 2C1.1(b)(2)(A) (1990 ver.). The district court sentenced petitioner to 64 months' imprisonment based on the judge's finding that the benefit to petitioner from the offense was between $5 and

$10 million.

Petitioner appealed his convictions and the government cross-appealed the sentence. The court of appeals affirmed petitioner's convictions, but remanded for resentencing on the ground that the district court's calculation of petitioner's gain was too vague. *United States v. Krilich*, 159 F.3d 1020, 1031 (7th Cir. 1998) (*Krilich I*). This Court denied certiorari on October 4, 1999, regarding issues related to his conviction. *United States v. Krilich*, 528 U.S. 810 (1999). Thereafter, petitioner was sentenced for a second time ("first resentencing") on November 1, 2000, to 87 months' incarceration. Pet. App. 15a. On July 16, 2001, on direct appeal of petitioner's first resentencing, the appellate court again vacated his sentence and remanded the case for a second resentencing. *United States v. Krilich*, 257 F.3d 689, 694 (7th Cir. 2001) (*Krilich II*). Upon remand, after a contested sentencing proceeding involving expert testimony, petitioner was sentenced for a third time ("second resentencing") to 135 months' incarceration. Pet. App. 33a. The judgment of conviction became final when the Supreme Court denied his Petition for a Writ of Certiorari on October 14, 2003. *United States v. Krilich*, 540 U.S. 946 (2003); and Government's Jurisdictional Memorandum at 2, 3/2/05). Pet. App. 12a-14a.

The petitioner filed three motions under Section 2255: in 2000, he challenged his conviction (the "conviction 2255"): in 2002, he challenged issues that first arose on remand (the "first sentencing 2255"). Petitioner could not have included the claims set forth in the first sentencing 2255 in his earlier-filed conviction 2255 because those claims did not arise for purposes of Section 2255 review until after the district court had already decided the conviction 2255. Notwithstanding that the district court, the government and petitioner all agreed

this proceeding was a continuation of the initial Section 2255 motion because it only addressed issues that first arose at resentencing, the court of appeals held that this first sentencing 2255 was a prohibited "second or successive" habeas petition and dismissed it for want of jurisdiction. Pet. App. 12a-14a, 41a-43a. Within one-year after the judgment of conviction became final, on October 14, 2004, petitioner filed a third Section 2255 motion again challenging issues that first arose at resentencing (the "second sentencing 2255").[1] Since the first sentencing 2255 motion had been dismissed for want of jurisdiction, he argued in the second sentencing 2255 that he had no previous opportunity to raise issues that first arose at resentencing in an initial Section 2255 motion. Nonetheless, the district court dismissed the second sentencing 2255 motion as a successive petition. *Id.* 34a-37a. The appellate court denied a COA. *Id.* 8a-9a.

1. Rules Governing the Submission of Section 2255 Motions.

Congress established in 28 U.S.C. § 2255 a procedure for federal prisoners to collaterally attack their convictions and sentences. In order to ensure that courts are not unnecessarily called upon to decide Section 2255 motions, a prisoner must first pursue to its conclusion any

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1 In the § 2255 motion filed October 14, 2004, petitioner raised a *Booker/Blakely* claim and by extension an *Appendri* claim. Pet. App.1a-7a. See *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004) and *Apprendi v. New* Jersey, 530 U.S. 466 (2000). Currently pending before this Court is *Cunningham v. The State of California, cert. granted*, 2006 U.S. LEXIS 1136 (U.S. Feb. 21, 2006) (No. 05-6551). Should the decision in *Cunningham* impact petitioner's case, it is respectfully requested that he be entitled to § 2255 relief based on that holding.

challenges he or she intends to raise on direct appeal. "It is a well-established, longstanding rule that a district court may not ordinarily consider a Section 2255 motion while direct review is still pending." Brief for the United States, *Clay v. United States*, 537 U.S. 522 (2003), at 22 (No. 01-1500). See *Kapral v. United States*, 166 F.3d 565, 572 (3rd Cir. 1999) (collecting cases); see also Rule 5, Rules Governing Section 2255 Proceedings, Advisory Committee Note (1997) (Section 2255 motion "is inappropriate if the movant is simultaneously appealing the decision.").

Once a Section 2255 motion becomes ripe upon the conclusion of direct review, a prisoner does not have an unlimited time to institute a collateral attack. The Antiterrorism and Effective Death Penalty Act ("AEDPA") imposes a one-year statute of limitations. 28 U.S.C. § 2255 ¶ 6. The one-year period begins to run from "the date on which the judgment of conviction becomes final" on direct review. *Id.* "A judgment of conviction includes both the adjudication of guilt and the sentence." See *Deal v. United States*, 508 U.S. 129, 132 (1993). As this Court made clear in *Clay*, when a federal prisoner on direct review seeks certiorari in this Court, "finality" attaches when certiorari is denied. *Clay v. United States*, 537 U.S. 522, 529 n.4 (2003).

2. Petitioner's Conviction 2255.

Petitioner filed a Section 2255 motion challenging the constitutionality of his conviction on October 3, 2000. At that time, petitioner's first and second resentencing were not subject to collateral attack because direct review of his resentencing had not concluded: not only had the district court not entered a written judgment on the first or second resentencing, but the direct appeal

from the first or second resentencing had not as yet been filed.

Petitioner recognized in his conviction 2255 motion that "claims made pursuant to 28 U.S.C. § 2255 should not normally be split and that a petitioner awaiting resentencing should normally wait until the resentencing judgment has become final before attacking the constitutionality of his underlying conviction." Motion Pursuant to 28 U.S.C. § 2255 To Vacate, Set Aside and Correct Sentence at 2 n.1 (Oct. 3, 2000). However, petitioner explained that he was filing his conviction 2255 protectively because his deadline to collaterally attack his conviction could be said to expire one year after the conviction became final – *i.e.*, on October 4, 2000 – rather than when all proceedings in the case became final. Accordingly, petitioner asked that if the district court deemed his first Section 2255 motion "premature" because it did not include challenges to his resentencing, the court either 1) stay the proceedings on the first Section 2255 motion; or 2) dismiss the first Section 2255 motion with leave to refile as an initial Section 2255 motion at a later time. *Id.* at 3 n.1.

On April 5, 2001, ten and one-half months before petitioner's direct appeal of his first resentencing became final and over two and one-half years *before* his judgment of conviction became final upon this Court's denial of certiorari on direct review, the district court denied petitioner's conviction 2255 motion on the merits. *United States v. Krilich*, 163 F. Supp. 2d 943 (N.D. Ill 2001).

3. Resentencing.

On remand from the appellate court in *Krilich I*, the district court applied the then current version of Guideline § 2C1.1, which had been substantively amended

on November 1, 1991. See U.S.S.G. App. C, Amend 367. Whereas the previous version of the Guideline had measured sentencing enhancements for bribery based on a defendant's gain (with no mention of loss to the government), the revised provision instructed the court to calculate a defendant's sentence based on "the value of the payment, the benefit received or to be received in return for the payment, *or the loss to the government from the offense*, whichever is greatest." U.S.S.G. § 2C1.1(b)(2)(A) (1994) (emphasis added).

On February 11, 2000, the district court judge orally pronounced petitioner's second sentence (first resentence). He sentenced petitioner to 87 months' imprisonment based on the 1994 Sentencing Guidelines including any applicable 1995 amendments. Applying the revised Guideline, the district court based the first resentence not on petitioner's purported gain, but "only on the estimated actual loss to the government from lost tax revenue (as opposed to the benefit to [petitioner])." Pet. App. 17a. Although petitioner was not subject to the revised Guideline, which went into effect after the conduct for which he was convicted, Seventh Circuit precedent at that time precluded him from seeking to have his sentence corrected under Fed. R. Crim. P. 35 until the judge entered a written judgment. *United States v. Clay*, 37 F.3d 338, 340 (7th Cir. 1994).

The district court did not enter a written opinion and judgment until November 2000, over eight and one-half months after oral pronouncement of sentence. Pet. App. 15a, 16a-28a. The court's opinion explained that it entered the 87-month sentence on the ground that petitioner "intended the government to lose" the tax revenue. *Id.* 21a. Petitioner had argued that his sentence should not be enhanced under U.S.S.G. § 2C1.1 because "he received no net benefit" from his conduct. *Id.*

However, the court "reluctantly conclude[d]" that petitioner "may be correct" that he received no net benefit, but decided that this argument was "legally irrelevant." *Id.* "Since [petitioner's] offense conduct was intended to cause the government a $14.2 million loss, that amount will be used for applying" the Sentencing Guidelines. *Id.*[2]

Petitioner sought to have his sentence corrected under Fed. R. Crim. P. 35. On November 6, 2000, petitioner filed a Rule 35 Motion to Correct Sentence, arguing that his sentence violated the Ex Post Facto Clause because it was based on a Guideline that looked to loss to the government, which was not a sentencing factor at the time petitioner committed his offense, as opposed to a defendant's gain.

On November 13, 2000, over nine months after oral pronouncement of sentence, the district court denied the Rule 35 motion but abandoned its reliance on the amended Guideline. In the Memorandum Opinion & Order denying petitioner's Rule 35 motion, the district court engaged in new fact-finding. Going well beyond the scope of Rule 35, the district court reopened the sentencing proceeding and for the first time made a factual finding of gain. Pet. App. 31a. Ignoring its previous recognition that petitioner had received no benefit, the district court asserted that "the benefit to"

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[2] The court now relied on "intended loss" rather than "actual loss" used at oral pronoucement of sentence because the government did not actually lose anything. After the oral pronoucement of sentence but before the entry of the written judgment, it was shown that the Internal Revenue Service had determined that the interest on the industrial revenue bonds at issue in petitioner's case were not tax-free. Pet. App. 20a. Therefore, the government did not lose any tax revenue from petitioner's conduct.

petitioner from his offense conduct "was approximately $14 million." *Id.* On that basis, the district court reaffirmed the 87-month sentence under the version of the Guidelines it had employed in imposing the February 11, 2000, oral pronouncement of sentence. Thus, petitioner's sentence was now based solely on this new factual finding of gain which was not a violation of the Ex Post Facto Clause.

Petitioner appealed his sentence arguing, *inter alia*, that the sentence was imposed in violation of the Ex Post Facto Clause. Petitioner also contended that the district court had exceeded its authority under Rule 35 in making new factual findings. The government cross-appealed from a downward medical departure granted by the district court.

The Seventh Circuit rejected petitioner's argument, concluding that "The district court's finding that the gain was $14 million is supported by the record...." *Krilich II*, 257 F.3d at 692. However, the court of appeals agreed with the government that the downward medical departure was inappropriate and again vacated petitioner's sentence, remanding with instructions that the district court impose a sentence in the range of 135 to 168 months. *Id.*

On the second remand, after a contested hearing involving expert testimony, the district court again resentenced petitioner. The final and third sentence was 135 months' imprisonment. Pet. App. 33a. Petitioner appealed the third sentence and the Seventh Circuit affirmed. Pet. App. 38a-40a. This Court denied certiorari on October 14, 2003, which was the date the judgment of conviction became final. *Krilich v. United States*, 540 U.S. 946 (2003); and Government's Jurisdictional Memorandum at 2, 3/2/05). Pet App. 12a-14a.

4. Petitioner's First Sentencing 2255 Motion.

While the direct appeal of issues regarding petitioner's resentencing was pending, on March 22, 2002, petitioner filed a § 2255 motion challenging issues that initially arose at his first resentencing. Motion Pursuant to 28 U.S.C. § 2255 to Correct Sentence and Memorandum in Support Thereof, 2/22/02. In his first sentencing 2255 motion, petitioner raised an ex post facto challenge and the claim that the district court did not have jurisdiction to make additional factual findings in November 2000, because Rule 35 only allows a court to correct sentencing errors within seven days of the date the sentence is orally imposed (in petitioner's case, seven days from February 11, 2000).

The district court, the government and petitioner all agreed that the § 2255 motion filed March 22, 2002, was *not* a "second or successive" petition under 28 U.S.C. § 2255. As the government explained, citing the Seventh Circuit's decision in *Dahler v. United States*, 259 F.3d 763 (7th Cir. 2001), "[The] present motion, although numerically [petitioner's] second, is not a 'second or successive' petition requiring prior appellate approval because he attacks sentences (those from his second and third sentencings) other than the sentence attacked by his prior motion." Government's Response to Defendant's Motion Pursuant to 28 U.S.C. § 2255 to Correct Sentence at 1-2 (Apr. 10, 2002). The district court denied petitioner's motion. Pet. App. 34a-37a. The district court concluded, notwithstanding petitioner's claim alleging that the trial court lacked subject-matter jurisdiction to reopen the sentencing proceedings over nine months after oral pronouncement of sentence, the issue was procedurally defaulted because petitioner had not asserted it on his direct appeal from his first

resentencing. *Id.* 35a. See *Norris v. United States*, 687 F.2d 899, 900 (7th Cir. 1982).

Petitioner sought a COA from the appellate court. Notwithstanding that the district court, the government and petitioner all agreed that the first sentencing 2255 motion was not a second or successive petition, on December 31, 2002, the court of appeals held that "The district court should not have entertained [petitioner's] request. It is his second collateral attack and therefore required this court's approval under 28 U.S.C. § 2255 ¶ 8." Pet. App. 41a-43a. The appellate court then vacated the judgement of the district court and remanded the matter "with instructions to dismiss for want of jurisdiction." *Id.* 43a.

5. Petitioner's Second Sentencing 2255.

On October 14, 2004, one-year after the judgment of conviction became final, the petitioner again sought to file a § 2255 motion addressing issues that first arose at resentencing. Petitioner argued that the district court could not have issued a final order on the previously filed sentencing Section 2255 motion until the final judgment in the case occurred. See *Kapral v. United States*, 155 F.3d 565, 571 (3rd Cir. 1999). ("only when the time for seeking certiorari review has expired is it appropriate for a defendant to commence a collateral attack on his conviction and sentence."). Thus, petitioner had one-year after the final judgment to collaterally attack issues that first arose at resentencing as part of his initial § 2255 motion.

Generally, the final judgment rule is strictly applied, particularly in criminal cases. *Flanagan v. United States*, 465 U.S. 259, 264-265 (1984). Petitioner argued that the appellate court lacked subject-matter

jurisdiction when it previously reviewed the non-final order of the district court. Thus, the appellate court lacked subject-matter jurisdiction when it concluded that petitioner's first sentencing 2255 motion was a second or successive petition.

This Court has held in a similar case that an appellate court does not have jurisdiction over interlocutory orders. *Andrews v. United States*, 373 U.S. 334 (1963); see also *United States v. Martin*, 226 F.3d 1042, 1048 (9th Cir. 2000), cert. denied, 532 U.S. 1002 (2001) ("The Supreme Court's decision in *Andrews* makes plain that the district court's order on a § 2255 petition is not final until the court resentences the petitioner." -- "§ 2255 order contemplating resentencing is deemed to be non-final"). Since the April 5, 2001, district court order was a non-final interlocutory order, the appellate court lacked appellate jurisdiction to review that order. Moreover, 28 U.S.C. § 2253(a) only permits an appeal from a final order. Thus, petitioner second sentencing § 2255 motion filed October 14, 2004, cannot be a second or successive petition because the district court had not fully adjudicated the original § 2255 motion and the appellate court did not have subject-matter jurisdiction over the first sentencing 2255 motion challenging his sentence. Accordingly, the appellate court lacked subject-matter jurisdiction to review the non-final order of the district court and erroneously dismissed the first sentencing 2255 motion as a second or successive petition.

In his second sentencing 2255 motion filed within one-year after the judgment of conviction became final, petitioner sought again to raise the subject-matter jurisdictional error that first arose at resentencing. Petitioner argued that the district court judge lacked subject-matter jurisdiction to reopen the sentencing proceedings approximately nine months after oral

pronouncement of sentence. In the Memorandum Opinion & Order denying the Rule 35 motion, the district court judge over nine months after oral pronouncement of sentence made for the first time a factual finding of gain. Pet. App. 31a. This evidentiary finding provided the sole factual basis to support the district court's enhancement of petitioner's sentence by 15 offense levels.

Effective December 1, 2004, while petitioner's second sentencing 2255 motion was still pending, Rule 35 was amended to define when a sentence is "imposed" for purposes of the rule. The amendment clarified the term "sentencing" to mean the oral announcement of the sentence. FED. R. CRIM. P. 35 (12/1/04). Significantly, the rule was made explicitly retroactive. Sup. Ct. Order (4/26/04) (governing application of Rule 35) ("[T]he foregoing amendments to the Federal Rules of Criminal Procedure...shall govern, insofar as just and practicable, all proceedings then pending.").

The Rule 35 change added a new clarifying provision, but did not create a new rule of criminal procedure. Instead, it resolved a deeply divided split in the circuits as to when a sentence is imposed which triggers the seven-day window for filing a Rule 35 motion. See *United States v. De La Torre*, 327 F.3d 605, 608 n.3 (7th Cir. 2003) (collecting cases); and *United States v. Aguirre*, 214 F.3d 1122, 1124-25 (9th Cir. 2000) (collecting cases). Under the majority view, a sentence was imposed upon oral announcement of the sentence. On the other hand, the minority view took the position that it meant the written entry of the judgement. See also Notes to Rule 35: Notes of Advisory Committee on Rules - 2004 Amendment ("the Committee believes that the better approach is to make clear in the rule itself that the term sentencing in Rule 35 means the oral announcement of the sentence.").

This petition does not challenge the scope of Rule 35. Rather, since the 2004 version of Rule 35, explicitly retroactive to pending cases, clarified when a district court may entertain a Rule 35 motion, this petition addresses the subject-matter jurisdiction of the district court to reopen the sentencing proceeding over nine months after oral pronouncement of sentence. The Seventh Circuit recently held that Rule 35 invokes subject-matter jurisdiction. *United States v. Smith*, 438 F.3d 796 (7th Cir. Feb. 23, 2006), ("Rule 35...is a real 'jurisdictional' rule rather than a case-processing requirement. See *Eberhart v. United States*, 126 S.Ct. 403, 163 L. Ed. 2d 14 (2005)."). Subject-matter jurisdiction may first be raised in a § 2255 motion. See *United States v. Cotton*, 535 U.S. 625, 633 (2002); *United States v. Ceballos*, 302 F. 3d 679, 690-692 (7th Cir. 2002); and *Harris v. United States*, 149 F. 3d 1304, 1308-09 (11th Cir. 1998).

The district court dismissed Petitioner's subject-matter claim raised in the second sentencing 2255 filed October 14, 2004, for lack of jurisdiction concluding it was a successive petition. In denying a COA, the district court stated "[petitioner] has not been permitted to file a successive petition; he hangs his hat on an argument that this petition is not successive because it attacks a resentencing. As we stated in our earlier order, this exception only applies when the issues challenged in the new petition arose for the first time at resentencing." Pet. App. 6a. However, the subject-matter claim raised in the second sentencing 2255 filed within one-year after the judgment of conviction became final first arose at resentencing. It was not nor could not have been raised in the conviction 2255. Since it was novel to the resentencing, the issue could only now be raised in an initial 2255 motion filed within one-year after the

judgment of conviction became final challenging issues that first arose at resentencing.[3]

Petitioner sought a COA from the appellate court. The appeals court affirmed the district court's decision to dismiss petitioner's § 2255 motion filed October 14, 2004, for lack of jurisdiction relying on its previous ruling that petitioner's § 2255 motion decided December 31, 2002, was a second or successive petition. Pet. App. 41a-43a. Again, petitioner was denied collateral review of any issues that first arose at resentencing. The net result was that petitioner's first and only § 2255 motion was decided on April 5, 2001. This was over two and one-half years *before* the judgment of conviction became final.

REASONS FOR GRANTING THE PETITION

The Court of Appeals Erred In Holding That Petitioner's Section 2255 Motion Filed Within One-Year After The Judgment Of Conviction Became Final Was A Prohibited "Successive" Habeas Application And The Decision Reaffirms The Split In The Circuits.

Petitioner's second sentencing 2255 filed within one-year after the final judgment was not a successive petition because petitioner could not have included his sentencing claim in any prior § 2255 motion. It is petitioner's position that absent extraordinary

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[3] The appellate court dismissed the first sentencing 2255 motion for lack of jurisdiction as a second or successive petition. However, it should have dismissed that motion as premature because it was filed prior to time the judgment of conviction became final.

circumstances, a district court lacks subject-matter jurisdiction to entertain a § 2255 motion prior to the time the judgment of conviction becomes final. Thus, the district court must resolve all issues that arose at resentencing in an initial § 2255 motion provided that motion is the first motion filed after the judgment of conviction became final and those issues have not been raised in a prior proceeding. Accordingly, petitioner's § 2255 motion filed October 14, 2004, challenging novel issues that first arose at resentencing is not a second or successive petition.

This case illustrates the waste of judicial resources that can occur when a district court undertakes habeas review, except under extraordinary circumstances, before direct review is exhausted. The judgment of conviction in this case did not become final until over two and one-half years after petitioner's § 2255 motion was decided. Moreover, petitioner inadvertently forfeited his right to have any collateral review of issues that first arose at resentencing.

The Seventh Circuit is in direct conflict with other federal circuit courts which hold, absent extraordinary circumstances, that the time for filing a § 2255 motion can only commence *after* the judgment of conviction on direct appeal becomes final. This decision reaffirms the split in the circuits as to when a federal court may entertain a § 2255 motion prior to issuance of the final judgment of conviction.

According to the Seventh Circuit: "The well established general rule is that, absent extraordinary circumstances, the district court should not consider § 2255 motions while a direct appeal is pending." *United States v. Robinson*, 8 F.3d 398, 405 (7th Cir. 1993) (collecting cases). However, in *Robinson*, even in the absence of extraordinary circumstances, the appellate

court "left to the sound discretion of the district court" whether it should entertain a § 2255 motion even though direct appeal is pending. *Id* at 405. On the other hand, in *Feldman v. Henman*, 815 F.2d 1318, 1323 (9th Cir. 1987), the court dismissed defendant's § 2255 motion filed while direct review was pending "because the district court lacked *subject matter* jurisdiction to entertain [the] petition." (emphasis added). In *Kapral*, the court held "only when the time for seeking certiorari review has expired is it appropriate for a defendant to commence a collateral attack on the conviction and sentence." *Kapral*, 166 F.3d at 571. The *Kapral* court summarized the law as follows:

> Furthermore, while Congress has imposed a one-year limitation on the commencement of collateral proceedings, it does not appear that Congress intended to encourage the commencement of collateral proceedings before a defendant has had a full and fair opportunity to litigate his or her claims on direct review. Indeed, as the government contends, commencing a collateral attack while direct review is ongoing would be "wasteful and pointless if the conviction is reversed by the Supreme Court." Appellee's Br. at 19. The outcome on direct review, even if not in the defendant's favor, may also cause the defendant to limit or rethink the claims that would be raised on collateral review, or even dissuade the defendant from seeking collateral review. For these reasons, and to ensure the orderly administration of criminal proceedings, defendants have long been discouraged from commencing § 2255 proceedings before the conclusion of direct review. See *Feldman*, *supra*; *United States v.*

> *Gordon*, 634 F.2d 638, 638-39 (1st Cir. 1980) (holding that in the absence of 'extraordinary circumstances' the 'orderly administration of criminal justice' precludes a district court from considering a § 2255 motion while review of the direct appeal is still pending"); *United States v. Davis*, 604 F. 2d 474, 484 (7th Cir. 1979) (same); *Welsh v. United States*, 404 F.2d 333 (5th Cir. 1968) (same); *Womack v. United States*, 129 U.S. App. D.C. 407, 395 F.2d 630 (D.C. Cir. 1968) (same); *Masters v. Eide*, 353 F.2d 517, 518 (8th Cir. 1965) (same); see also Rule 5, Rules Governing § 2255 Proceedings, Advisory Committee Note (1997) (§ 2255 motion "is inappropriate if the movant is simultaneously appealing the decision"). *Kapral*, 166 F.3d at 572.

See also *United States v. Burch*, 202 F.3d 1274, 1276 (10th Cir. 2000) ("Section 2255 authorizes and addresses the *commencement* of collateral attack on a sentence.") (emphasis added).

In *United States v. Lafromboise*, 427 F.3d 680, 686 (9th Cir. 2005), the court stated "until direct appellate review is exhausted the district court may not entertain a motion for habeas relief." In two opinions issued after *Feldman*, the Ninth Circuit concluded that the district court should not entertain a § 2255 motion until the direct appeal is resolved. See *United States v. Pirro*, 104 F.3d 297, 299 (9th Cir. 1997); and *United States v. Deeb*, 944 F.2d 545, 548 (9th Cir. 1991). However, in a footnote the appellate court in *Lafromboise* questioned whether this was a subject-matter jurisdictional bar or simply a "prudential concern." Without overturning *Feldman*, the court commented:

> There is some dispute whether this rule reflects a jurisdictional bar or simply a prudential concern. *Compare Feldman*, 815 F.2d at 1323 (dismissing defendant's premature habeas petition "because the district court lacked subject matter jurisdiction to entertain [the] petition") *with Pirro*, 104 F.3d at 299 (noting that this rule was created "for reasons of judicial economy") *and* Rules Governing § 2255 Proceedings for the United States District Courts, Rule 5, Adv. Comm. Notes ("we are of the view that there is no jurisdictional bar to the District Court's entertaining a Section 2255 motion during the pendency of a direct appeal but that the orderly administration of criminal law precludes considering such a motion absent extraordinary circumstances."). We need not resolve this discrepancy, however, because the district court should refrain from hearing LaFromboise's § 2255 motion until after he exhausts his direct appellate review rights under either theory. *Lafromboise*, 427 F.3d at 686 n.9.

The appellate court then vacated the district court's order and remanded the case with instructions to dismiss the § 2255 motion without prejudice. *Id.* at 686. It specifically noted: "In light of the procedural posture of this case, any subsequent § 2255 motion LaFromboise may file would not be a successive motion." *Id.* at n.10.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Philip W. Sandler
(Counsel of Record)
Sandler & Associates
Two Mid America Plaza
Suite 800
Oakbrook Terrace, IL 60181
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OO C 6078
UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

1/12/05

US vs. Robert R. Krilich, Sr.

***

☒ [Other docket entry] This matter comes before the court on the motion of Robert Krilich to correct, vacate, or set aside his sentence pursuant to 28 U.S.C. § 2255. His motion sets forth two grounds for relief. The first contends that the sentencing judge was without jurisdiction to render the third sentence he received because of particular time limits set forth within Fed. R. Crim. Proc. 35. The second avers that Krilich's sentence was increased in a way that runs afoul of the Supreme Court's recent decision in *Blakely v. Washington*, -- , U.S. --, 124 S. Ct. 2531, 2537 (2004). We dismiss the first portion of his motion for lack of jurisdiction. We dismiss the second portion of the motion relying on *Blakely* without prejudice to its representment should the case ultimately he given retroactive effect. This terminates all pending motions.

ORDER

This matter comes before the court on the motion of Robert Krilich to correct, vacate, or set aside his sentence pursuant to 28 U.S.C. § 2255. His motion sets forth two grounds for relief The first contends that the sentencing judge was without jurisdiction to render the third sentence he received because of particular time limits set forth within Fed. R. Crim. Proc. 35. The second avers that Krilich's sentence was increased in a way that runs afoul of the Supreme Court's recent decision in *Blakely v. Washington*, -- U.S. --, 124 S. Ct. 2531, 2537 (2004).

Krilich has filed at least two other motions seeking relief under § 2255. Generally, a prisoner filing a second or successive § 2255 motion must first obtain permission to do so from the appropriate court of appeals. 28 U.S.C. §§ 2244(b)(3)(A), 2255 Par. 8. The Seventh Circuit has not authorized Krilich to file a successive application, so he can proceed only if his current contention can be characterized as an initial attack rather than a successive one. See *Walker v. Roth*, 133 F.3d 454, 455 (7th Cir. 1997). Although Krilich argues that his motion rests on issues that arose for the first time at the third resentencing, we disagree. As was the case in *Dahler v. United States*, 259 F.3d 763 (7th Cir. 2001), and *United States v. Smith*, 241 F.3d 546 (7th Cir. 2001), the circumstances here represent a claim of error that predated the most recent resentencing. The core of the arguments that Krilich now advances did not crop up for the first time in 2002; they occurred in 2000 and, at best, merely recurred in 2002. Consequently, they could have been, and were, presented before the latest resentencing, making that

aspect of the instant motion not an initial attack but a successive petition. Because it has not been authorized by the Seventh Circuit, we dismiss that portion of his motion for lack of jurisdiction.

Turning to the second basis, we note that the Supreme Court has not deemed the rule in *Blakely* retroactively applicable to prisoners such as Krilich. As a result, it would be imprudent for us to take up the issue of whether *Blakely* applies to his situation and what impact, if any, it would have on the sentence he received. However, because the Court has not definitively decided the issue of retroactivity, we dismiss the portion of the motion relying on *Blakely* without prejudice to its representment should the case ultimately be given retroactive effect.

Dated: January 12, 2005
CHARLES P. KOCORAS Chief Judge
United States District Court

OO C 6078
UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLISNOIS

1/12/05

US vs. Robert R. Krilich, Sr.

JUDGMENT IN A CIVIL CASE

***

☒Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that the Court converts the earlier denial of the portion of defendant's petition referencing *Booker* and *Blakely* from a denial without prejudice to a denial with prejudice.

Date: FEB 2 4 2005

Michael W. Dobbins, Clerk of Court

Stephen C. Tokoph, Deputy Clerk

OO C 6078
UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

2/24/05

US vs. Robert R. Krilich, Sr.

Docket Entry Text:

In light of these considerations, Krilich's submissions satisfy neither of the conditions listed in *Rutledge*, and his request for a certificate of appealability is accordingly denied. We also convert our earlier denial of the portion of the petition referencing *Booker* and *Blakely* from a denial without prejudice to a denial with prejudice.

STATEMENT

ORDER

This matter comes before the court on the application of petitioner Robert Krilich for a certificate of appealability for our order of January 12, 2005, which dismissed his third petition filed pursuant to 28 U.S.C. § 2255. Krilich has filed a notice of appeal, but appellate proceedings cannot commence without a certificate of appealability either from this court or a circuit judge of the Court of Appeals. 28 U.S.C. § 2253(c); see also Fed. R. App. Proc. 22(b). A court should issue a certificate of appealability in a case before the court under 28 U.S.C. § 2255 "if the [defendant] has made a substantial showing of the denial of a constitutional right." 28

U.S.C. § 2253(c). Such a showing is made if "reasonable jurists could debate whether the challenges in his habeas petition should have been resolved differently or that his petition adequately shows a sufficient chance of the denial of a constitutional right that he deserves encouragement to proceed further." *Rutledge v. United States*, 230 F.3d 1041, 1047 (7th Cir. 2000).

We ordered that Kriclich's petition be dismissed because we have no subject matter jurisdiction over successive § 2255 petitions in the absence of a demonstration that the petitioner has received leave to file the petition from the Seventh Circuit. See 28 U.S.C. §§ 2244(b)(3)(A), 2255 Par. 8. It is undisputable that these statutes require of leave from the appropriate court of appeals. Krilich has not been permitted to file a successive petition; he hangs his hat on an argument that this petition is not successive because it attacks a resentencing. As we stated in our earlier order, this exception only applies when the issues challenged in the new petition arose for the first time at the resentencing. Here, Krilich's beefs have remained the same since his first petition. In addition, his alternative argument that the holdings in *Blakely v. Washington*, -- U.S. --,124 S. Ct. 2531, 2537 (2004) and *United States v. Booker*, -- U.S. --, 125 S. Ct. 738, 756 (2005), apply retroactively, has been conclusively (for our purposes) controverted by the Court of Appeals. See *McReynolds v. United States*, 2005 WL 237642, at *2 (7th Cir. Feb. 2, 2005).

In light of these considerations, Krilich's submissions satisfy neither of the conditions listed in *Rutledge*, and his request for a certificate of appealability is accordingly denied. We also convert our

earlier denial of the portion of the petition referencing *Booker* and *Blakely* from a denial without prejudice to a denial with prejudice.

Dated: FEB 2 4 2005
CHARLES P. KOCORAS Chief Judge
United States District Court

No. 05-1355
United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted April 22, 2005
Decided May 18, 2005

Before Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. ILANA DIAMOND ROVNER, Circuit Judge

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 00 C 6078

Charles P. Kocoras, Chief Judge

ROBERT R. KRILICH, SR.,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee

ORDER

A jury convicted Robert Krilich of fraud and conspiracy to violate the Racketeer Influenced Corrupt Organizations (RICO) Act. After multiple appeals and two resentencings, he was sentenced to 135 months' imprisonment. See *United States v. Krilich*, 257 F.3d

689 (7th Cir. 2001); *United States v. Krilich*, 53 Fed. Appx. 788 (7th Cir. 2002). Krilich repeatedly sought collateral relief on his various sentences, which we repeatedly denied.

This court has clearly held that Krilich's last motion under 28 U.S.C. § 2255 was itself successive, *United States v. Krilich*, 53 Fed. Appx. 787 (7th Cir. 2002). The district court correctly dismissed this action for lack of jurisdiction, and Krilich's request for a certificate of appealability is DENIED.

No. 05-1355
United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

October 28, 2005

Before Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. ILANA DIAMOND ROVNER, Circuit Judge

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 00 C 6078

Charles P. Kocoras, Chief Judge

ROBERT R. KRILICH, SR.,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed by petitioner-appellant on June 30, 2005, no judge in active service has requested a vote thereon, and both of the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing with suggestion for rehearing en banc be, and the same is hereby DENIED.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Appeal from the United States District
Court for the Northern District of
Illinois, Eastern Division
No. 00 C 6078

Charles P. Kocoras, Chief Judge

JURISDICTIONAL MEMORANDUM

The UNITED STATES OF AMERICA by PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, hereby responds to the Court's Order of February 17, 2005, directing the appellant and appellee to file "a brief memorandum stating why this appeal should not be summarily affirmed" including a detailed history of any prior request for collateral relief. Upon review of the record, the government hereby states that in light of *Nunez v. United States*, 96 F.3d 990 (7th Cir. 1996) and *McReynolds v. United States*, 2005 WL 237642 (7th Cir. Feb. 2, 2005), the district court properly dismissed appellant's successive § 2255 motion, and the decision of the district court should be summarily affirmed.

History of the Case

Robert Krilich was sentenced three times following his criminal convictions for bank fraud and racketeering. The convictions were affirmed, but the first two sentences were vacated, *United States v. Krilich*,159 F.3d 1020 (1998), and *United States v.*

Krilich, 257 F.3d 689 (2001). The third sentence was affirmed. *Krilich v. United States*, 53 Fed.Appx. 788, 2002 WL 31920996 (7th Cir.(Ill.) (unpublished opinion). On October 14, 2003, the Supreme Court denied his petition for writ of certiorari and his conviction became final. *Krilich v. United States*, 540 U.S. 946 (2003).

Krilich sought collateral review of the first sentence. That petition was denied by the district court, and this Court declined to issue a certificate of appealability. See *Krilich v, United States*, 53 Fed.Appx. 787, 2002 WL 31920989 (7th Cir.(Ill.) (unpublished opinion). Krilich next sought collateral review of his second sentence based upon his claim that the district court violated the Constitution's Ex Post Facto Clause by considering the loss inflicted by his offenses when imposing sentence. *Id.* The district court denied this second petition on the merits, and Krilich sought a certificate of appealability. In denying his motion for a certificate of appealability, this Court held that Krilich's collateral attack on his second sentence was his second collateral attack "which does not have (and could not receive) approval under § 2255 Par. 8." This Court vacated the judgment of the district court (which denied his second petition), and remanded the case with instructions to dismiss for want of jurisdiction. *Id.*

On October 14, 2004, Krilich filed his third §2255 motion.[1] This motion sought to

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Footnotes

fn1 Although the parties have referred to this instant motion as his "third" §2255, defendant also has pending before J. Coar, yet another collateral attack styled "Petition for Writ of Audita Querela or in the Alternative Petition for Writ of Error Coram Nobis Pursuant to the All Writs Act, 28 U.S.C.§ 1651." This pro-se collateral attack, filed August 16, 2004, attacked the 1972 conviction used to determine the criminal history category for his sentence in the instant case. Under *United States v. Melton*, 359 F.3d 855 (7th Cir. 2004), this attack may be properly viewed as substantively one more attack within the scope

****

94 CR 419-1
UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

JUDGMENT IN A CRIMINAL CASE

☒was found guilty on count(s) 1, 2-15 after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Numbers
18 U.S.C. 1962(d)	Racketeering	10/18/91	I
18 USC 1014 and 2	False Statements to Banks	10/18/91	2-15

***

DAVID H. COAR, U.S. DISTRICT COURT JUDGE
NOVEMBER 1, 2000

***

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned a total term of EIGHTY SEVEN (87) MONTHS

☒The defendant is remanded to the custody of the United States Marshal.

No. 05-1355

94 CR 419-1
IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
HONORABLE DAVID H. COAR

United States of America

v.

Robert S. Krilich, Sr.

MEMORANDUM OPINION

Defendant Robert S. Krilich, Sr. is before this Court for sentencing. For the reasons stated below, this Court sentences Krilich and commits his to the Bureau of Prisons for a term of 87 months to be followed by three years supervised release.

Background

Krilich was convicted of fourteen counts of fraud under 18 U.S.C. § 1014, and conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(4). On June 23, 1997, Judge Grady sentenced Krilich to sixty-four months in prison. Krilich appealed both his conviction and his sentence and the United States cross-appealed his sentence. On October 27, 1998, the United States Court of Appeals for the Seventh Circuit affirmed Krilich's convictions but vacated Judge Grady's sentencing order and remanded the case for re-sentencing. On October 8, 1999, Krilich's

case was reassigned to his Court pursuant to Local General Rule 2.30F.

According to the Seventh Circuit, this Court was to consider on remand the revenue that Krilich's bribery scheme[1] caused the Internal Revenue Service to lose. See *United States v. Krilich*, 159 F.3d 1020, 1031 (7th Cir. 1999) ("the existence of a substantial tax loss is undeniable"). Additionally, the Seventh Circuit stated that this Court "should give no weight to. . .the disparity between Krilich's presumptive sentence under § 2F1.1 and [the bribee,] Mayor Sarallo's actual sentence." *Id.* at 1031. Beginning on January 28, 2000, this Court heard expert testimony to undertake calculation of the tax loss to the government, despite the Seventh Circuit's implication that a precise calculation would be difficult. *Id.* ("[c]alculating the actual loss in tax revenues from providing investors with a tax shield that the law does not allow is quite complex . . . .")

The government presented testimony from David Joseph Ross, who is senior vice president of a consulting firm specializing in economic analysis of a variety of legal and regulatory matters. Ross calculated both the benefit that Krilich would have received from being able to borrow at a tax-free rate and the loss that the United States Treasury would have suffered had Krilich been able to borrow at a taxfree interest rate. Assuming that the bonds were tax-free, Ross concluded that both the benefit to Krilich and the loss to the government would be about $14.2 million. Crediting and relying only on the estimated actual loss to the government from lost tax revenue (as opposed to the benefit to Krilich), this Court announced Krilich's

sentence and indicated that a written order would be forthcoming.

Before this Court issued its written statement of reasons, the Internal Revenue Service issued an adverse determination with respect to the bonds at issue in this case. The IRS found that the interest on the bonds was not tax free as originally intended. Krilich subsequently moved to set aside this Court's oral ruling regarding tax loss. According to Krilich, since the IRS determined that the bond interest was taxable, the underlying premise for his sentence enhancement - a tax loss of $14.2 million - ceased to exist. Krilich filed a memorandum in support of his motion to which the government filed a response and to which Krilich, in turn, filed a reply. For the reason stated, below, this Court's initial determination of Krilich's sentence remains the same, albeit for slightly different reasons.

Analysis

"Because the underlying conduct for [Krilich's] RICO conviction was bribery, the relevant [sentencing] guideline is § 2C1.1(b)(2)(A)." Krilich, 159 F.3d at 1029. That section provides that "if the value of . . . the loss to the government from the offense. . . exceed[s] $2,000, [the offense level will] increase by the corresponding number of levels from the table in § 2F1.1" U.S. Sentencing Guideline Manual § 2C1.1(b)(2)(A). The table set forth in Section 2F1.1 varies the sentencing range. . . depending on the amount of loss." *United States v. Lauer*, 148 F.3d 766, 767 (7th Cir. 1998). A loss greater than $10,000,000, increases the offense level by fifteen levels. See U.S. Sentencing Guideline Manual § 2F1.1(b)(1)(P). The loss mentioned in Section 2F1.1 can

be either an actual loss or an intended loss, whichever is greater. *Id.* (citing § 2F1.1, Application Note 7) (further citations omitted). An intended loss is measured by the amount that the defendant put at risk. See *Lauer*, 148 F.3d at 768. Intended loss is not mitigated by a defendant's hope that the victimized party not actually be harmed. See *id.*

Loss to the Government

To calculate the actual loss to the government, the government's expert collected data and compared interest rates on tax-free debt instruments and taxable debt instruments that were otherwise equivalent. The data indicated the difference between the rates demanded for investment in taxable as opposed to tax-free securities. Based on the data, Ross estimated the interest rate that Krilich would have had to pay if he had been unable to obtain tax-free bonds to finance the project.

Because tax-free bonds financed the project, the investors did not pay taxes to the United States Treasury on the interest that they received. Conversely, if the interest on the bonds had not been tax free, the investors would have had to pay taxes on the interest received. Therefore, the United States lost the benefit of the taxes it would have received but for the fact of the improper attempt at tax-free financing. Applying the interest data previously discussed, Ross concluded that between 1986 and 1991, the loss to the government, assuming a 28% marginal tax rate for investors, would have been $16.5 million. Using the average marginal tax rate for all United States taxpayers, the loss would have amounted to $14.2

million. This Court credited Ross's testimony and found that the government suffered a loss of $14.2 million.

As noted above, after this Court's hearing on actual tax loss and after the oral ruling, the IRS determined that the interest on the bonds in question was taxable. In other words, the "actual loss" estimated by the government's expert was no longer an actual loss. The interest on the bonds turned out to be taxable, not tax-free as intended. The absence of an actual loss of $14.2 million, however, does not save the day for Krilich because he intended the government to lose that revenue. In the parlance of the *Lauer* case, Krilich put $14.2 million "at risk" through his bribery scheme. See *Lauer* 148 F.3d at 768.[2] Even though Krilich's bribery scheme did not result in the issuance of tax-free bonds, he intended to have tax-free bonds issued. Indeed, this was the ultimate goal of Krilich's bribe. At bottom, if things had turned out as Krilich had planned, the tax-free bonds would have been issued and the government would be deprived of $14.2 million in tax revenue. This intended loss is no less tied to Krilich's bribery scheme than the actual loss that would have befallen the government.[3]

Krilich counters both the loss and the gain calculations by positioning that the project actually undertaken thought the tax-free financing was not economically feasible at taxable (higher) interest rates. Krilich therefore concludes that Ross' comparisons between taxable financing and tax-free financing is illusory. In support of this theory, Krilich does not offer a single "fact." Instead, he relies on the testimony of Stan Lazar, an expert in real estate accounting (not real estate finance). Lazar opined that Industrial Revenue Bond Financing is used to create incentives for builders

to undertake projects that otherwise would not be built. Neither, Krilich or Lazar, however, offered any support for this sweeping statement. This Court is unwilling to conclude that the mere fact that a condition of financing was that 20% of the project be devoted to low income housing renders the project economically unsound. It is at least equally plausible that Internal Revenue Bond financing was obtained (by way of bribe) to increase the profits for an already viable project simply because of greed. It would have been relatively simple for Krilich to reconstruct the financial analysis of the project and compare the projected results of alternative financing to counter Ross' assumptions. Absent other evidence, the Court rejects Krilich's unsupported analysis because Ross' approach is reasonable.

Krilich also argues that he received no net benefit from the proceeds of the financing. Relying on Application Note 2 to Guideline 2C1.1, Krilich argues that where a contract is awarded in return for a bribe, the measure of net benefit is the defendant's profit on the contract. Krilich states further that there was no profit on the contract. He asserts that there was a loss. The Court reluctantly concludes that Krilich may be correct on this latter factual point, but notes that it is legally irrelevant.[4] Since Krilich's offense conduct was intended to cause the government a $14.2 million loss, that amount will be used for applying §2F1.1.

The Court finally rejected Krilich's argument that the "intended loss" doctrine is inapplicable in this case. Krilich analogizes to cases involving fraudulent loan applications and fraudulent contract procurement. Such analogies are not applicable here. In fraudulent loan applications and fraudulent contract procurement

cases, an exception is made under the intended loss doctrine for fraudfeasors who intend to perform under contract of loan. *See, e.g., United States v. Schneider*, 930 F.2d 555, 558 (7th Cir. 1991). This exception exists because these fraudfeasors do not actually intend to cause a loss to the government equal to the amount of the loan or perform the full value of the contract. *See, e.g., id.* In stark contrast to these cases, Krilich intended to cause the government a tax loss of approximately $14.2 million despite his attempt to and intention to "perform" under the contract obtained as a result of his bribe to Mayor Sarallo. Unlike the loan or contract procurement cases, Krilich's intent throughout was to have tax-free bonds issue to finance his project. Tax-free bonds would have deprived the government of revenue that could have otherwise been collected by taxing the interest on taxable bonds.

The parties do not dispute that prior to any consideration of departure, Krilich's base offense level is 17. Since the Court determines that Krilich intended the government to suffer a $14.2 million tax loss, the pre-departure base level is increased 15 levels to 32.

Departure Based on Krilich's Medical Conditions

Krilich also moves for downward departure on the basis of his medical and psychological conditions. Dr. Richard Herbert, who is no longer engaged in active practice, testified that Krilich was a patient of his before Krilich's incarceration and that he saw Krilich a number of times before his incarceration. On cross examination, Dr. Herbert acknowledged that he had not been listed as one of Krilich's treating

physicians on forms that Krilich executed upon entry into the custody of the Bureau of Prisons.

Additionally, Dr. Herbert stated that he treated Krilich several times "to the extent that I had access to him. He. . .came to my office. I offered treatment and I gave him advice what should be done." Tr. Proceedings Feb. l, 2002 at 283-84. Dr. Herbert had no records of Krilich's visits, and never did a complete history of Krilich. Dr. Herbert has no particular expertise in the field of cardiology, but this did not defer him from expressing numerous opinions about Krilich's heart condition(s) and the care provided, or not provided, by the Bureau of Prisons. This Court gives no weight to Dr. Herbert's testimony.

Dr. Bernard Rubin is a psychiatrist who testified that Krilich is suffering from at least four serious physical infirmities: (1) chronic cardiovascular disease; (2) chronic peripheral vascular disease with hypertension; (3) obstructive pulmonary disease; and (4) back disease of lumbar and Lumboscaral origin. According to Dr. Rubin, Krilich also suffers from a major depressive disorder, characterized by insomnia, anorexia, "distractibility", hopelessness, suicidal thinking and tearfulness. The supplement to the Presentence Investigation Report also sets out the medical conditions that Mr. Krilich suffers from and the medications he is receiving.

Dr. Rubin also opined as to the effect that prison would have on Krilich. Dr. Rubin believes that there are three difficulties with treatment of physical or psychological problems in prison: (l) prisons are organized punishment; (2) they are organized for security; and (3) medical, surgical and psychological

concerns are secondary. Therefore, he concludes that Krilich's various conditions can best be addressed outside of an institutional setting.

The Government argues that because many of Krilich ailments are chronic and because he would suffer from them whether or not he was incarcerated, no departure is warranted. The Court disagrees. Krilich's age and the number and complexity of his ailments render him unlike the "typical" defendant who appears in this court for sentencing. While this Court is aware that the mandatory minimum requirements of the Sentencing Guidelines have created an increased need to provide geriatric treatment for inmates, Krilich's health issues present an unusual profile. The conditions of confinement will undoubtedly aggravate his conditions and make treatment more difficult. Therefore, a departure is warranted. The question, therefore, is the level of departure.

Krilich argues for a substantial departure to a level that would require his immediate release on the theory that treatment of his ailments by the Bureau of Prisons has been inadequate. The issue, however, is whether the Bureau of Prisons is incapable of providing medically reasonable treatment to Krilich. While the manner in which he had been treated in the past is some indication of standards within the Bureau of Prisons and therefore somewhat predictive of future treatment, the issue is broader than whether doctors hired by Krilich would have treated his conditions differently.

This Court has no doubt that a person of Krillch's means could obtain first class medical and

psychological treatment outside of a prison environment and will assume, without deciding, that the treatment the Krilich could receive outside of prison would be superior to the treatment he is receiving from the Bureau of Prison. The Court cannot, however, conclude that the treatment that Krilich has received and which he is likely to receive in the future from the Bureau of Prison is so lacking in quality that this Court should depart to a level that requires his immediate release, or to a level at which some alternative to imprisonment would be available. Unfortunately, Krilich has approached the question of departure as an all or nothing proposition. The focus of his proofs and arguments has been an all out assault on continued confinement. He has attempted to show that the BOP has not and will not adequately treat his medical and psychological conditions and therefore the court should depart to level that will allow some form of home detention which permit treatment by his personal treaters. In his single-minded thrust to avoid further incarceration, Krilich has neglected to provide the court with information necessary to readily determine an appropriate departure that takes into account his conditions, measured by the particular manner in which they impose upon him hardships outside of the heartland. Moreover, the guidelines themselves provide little textual guidance in determining the extent of downward departure.

§5H1.4 of the Guidelines provides that while physical condition (of a defendant) is not "ordinarily relevant" in determining whether a departure is warranted, "an extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range." The example contained in the

guideline refers to a defendant who is so seriously ill or infirm that "home detention may be as efficient as, and less costly than, imprisonment" There is no questions but that a sentence that would have Krilich pay the cost for treatment of his various ailments would be less costly to the government. It is unclear whether such a sentence would be more "efficient" than a period of imprisonment. If efficiency in this context refers to the possibility that the Bureau of Prisons lacked the ability to treat the defendant in a BOP facility and would have to transport the defendant to a location with the attendant travel and security costs, then there is no showing that the Krilich's circumstances warrant such an approach. If the term is to be read more expansively, taking into account the broad goals of sentencing (See 18 U.S.C. §3553(a)(2)), it is clear that those goals are not served by departing to a level where Krilich escapes a substantial prison term. Neither his physical condition nor the ends of sentencing are served by such a result. Krilich stands convicted of serious crimes which deserve a serious sanction. The fact that he suffers significant medical ailments serves as a reason to mitigate the punishment, not to eliminate it.

None of Krilich's four major illnesses (cardiovascular disease, peripheral vascular disease with hypertension, obstructive pulmonary disease and back disease/lumbar and lumbosacral origin), taken alone, justify a departure. In combination with each other, they present treatment and quality of life difficulties that fall outside the heartland. The court will therefore depart one level for each of the four conditions and an additional level for the interaction of the ailments.

Departure Based on Sentencing Disparity

Krilich also sought a departure based on the argument that the loss amount overstates the seriousness of his conduct. Intertwined within this argument is Krilich's argument of sentencing disparity. According to Krilich, he was deduced into paying the bribe by Mayor Sarallo's officials who where "on the make." These officials received sentences much less severe than that which is called for under the Guidelines for Krilich. Krilich's argument in this regard is exceptionally misguided. While wise enough not to argue that Judge Grady's earlier ruling is the law of the case, Krilich foolishly argues that this departure determination is "certainly entitled to great weight." Krilich's argument amazingly ignores Seventh Circuit precedent that could not be more on point - namely, the appellate opinion in this case, expressly reversing the decision that Krilich asks this Court to adopt here. See *United States v. Krilich*, 159 F.3d 1020, 1021-22 (7th Cir. 1998). The Seventh Circuit could not have more clearly precluded such consideration. Id. ("on remand the Judge should give no weight to. . .the disparity between Krilich's presumptive sentence under §2F1.1 and mayor Sarallo's actual sentence. . .") In addition, as the Government notes, Krilich has not argued on remand that the Guidelines were misapplied in either his or Sarallo's case. The request to depart further is denied.

Conclusion

For the foregoing reasons, this Court sentences Robert S. Krilich, Sr. and commits him to the Bureau of

Prisons for a term of 87 months to be followed by three years supervised release.

DATE: November 1, 2000

Footnotes

1 Bribery was one of the predicated acts for Krilich's RICO conspiracy conviction.

2 Ross's analysis regarding the actual tax-revenue loss to the government is equally valid with respect to intended loss. In hindsight, Ross's calculations just turned out to be hypothetical estimates of what the government would have lost.

3 Because the Court determined that Krilich intended that the government lose $14.2 million in revenue, it is not necessary to address the government's waiver argument.

4 This Court's reluctance stems from a lingering doubt as to whether the "contract" obtained in return for the bribe is limited to the tax-free financing or, as he suggests, encompasses the entire building project. Moreover, Krilich's evidence of detriment (offsetting any benefit he enjoyed) includes several questionable items such as: $2.5 million or more for a criminal defense counsel and incarceration-related matters, the $5 million in personal funds for the purchase of the subseries I bonds (without offsetting that amount by the value of the 26 completed townhouses), and allocation of office and maintenance expenses to the Oakbrook Terrace Project.

94 CR 419-1
IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ILLINOIS
- EASTERN DIVISION
HONORABLE DAVID H. COAR

United States of America

v.

Robert S. Krilich, Sr.

MEMORANDUM OPINION & ORDER

On November 1, 2000, this Court sentenced defendant Robert Krilich to eighty-seven months confinement in a federal prison and issued a statement of reasons for that order. Krilich now moves under Federal Rule of Criminal Procedure 35(c), to correct or reduce his sentence. For the reasons stated below, this motion is DENIED.

Background

Krilich was convicted of fourteen counts of fraud under 18 U.S.C. § 1014, and conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1962(4). On June 23, 1997, Judge Grady sentenced Krilich to sixty-four months in prison. Krilich appealed both his conviction and his sentence and the United States cross-appealed his sentence. On October 27, 1998, the United States Court of Appeals for the Seventh Circuit affirmed Krilich's convictions but vacated Judge Grady's sentencing order and remanded the case for re-sentencing. On October 8, 1999, Krilich's

case was reassigned to his Court pursuant to Local General Rule 2.30F.

This Court originally stated that it would rely on the actual loss to the government as the basis for Krilich's sentence on remand, as the Court of Appeals for the Seventh Circuit has directed in *United States v. Krilich*, 159 F.3d 1020, 1031 (7th Cir. 1998). Before this Court issued its written statement of reasons, the Internal Revenue Service issued an adverse determination with respect to the bonds at issue in this case. The IRS found that the interest on the bonds was not tax free as originally intended. Krilich subsequently moved to set aside this Court's oral ruling regarding tax loss. In the November 1, 2000, memorandurn opinion, this Court relied primarily on the "intended loss" to the government as the basis for Krilich's sentence. Now, Krilich argues that the relevant guideline - the one that was in place when Krilich committed his crime - does not permit this Court to consider the loss to the government as a basis for enhancing the base offense level.

Analysis

Krilich's motion is denied because the benefit to him, like the intended loss to the government, is also greater than $10 million. In this motion, even Krilich acknowledges that the benefit to him is a basis for enhancing his sentence. The Seventh Circuit recognizes in its opinion that there is a correlation between Krilich's gain and the government's loss, albeit not an exact correlation. See *Krilich*, 159 F.3d at 1031. Of more significance here, though, is the testimony of David Joseph Ross, who is the government finance

expert. As noted in this court's previous opinion. Ross testified that:

> both the benefit that Krilich would have received from being able to borrow at a tax-free interest rate and the loss that the United States Treasury would have suffered had Krilich been able to borrow at a taxfree interest rate ... would be about $ 14.2 million.

Mem. Opinion, Nov. 1, 2002, at 2.fn1 In response to Krilich's objections to Ross's opinion, this Court also noted that "Krilich d[id] not offer a single "fact"' to rebut that opinion. *Id.* at 5. Krilich has not presented this Court with anything that would alter that original conclusion. Krilich makes too much of the fact that in the original memorandum opinion, this Court "reluctantly conclude[d] that Krilich may be correct "that he ultimately lost money on the project." As noted in footnote four of that opinion, this Court doubted the propriety of many of the so-called "deductions" that Krilich used to conclude that he had actually suffered a loss. At the bottom, Ross's testimony provides a more substantial basis for determining the benefit and persuades this Court that the benefit to Krilich was approximately $14 million. In view of Ross's factually uncontradicted opinion, this Court again concludes that the benefit to Krilich exceeds $10 million and that on the basis of either the benefit to him or the intended loss to the government, the sentence enhancement remains the same.

CONCLUSION

For the foregoing reasons, Krilich's motion is DENIED.

Footnotes

N1Ross actually estimated the benefit to Krilich as $14.6 million. See Tr. of Proceedings, January 28, 2000, at 23.

94 CR 419-1
UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

JUDGMENT IN A CRIMINAL CASE

☒was found guilty on count(s) 1, 2-15 after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Numbers
18 U.S.C. 1962(d)	Racketeering	10/18/91	I
18 USC 1014 and 2	False Statements to Banks	10/18/91	2-15

***

DAVID H. COAR, U.S. DISTRICT COURT JUDGE
FEBRUARY 14, 2002

***

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned a total term of ONE HUNDRED THIRTY FIVE MONTHS(135)

☒The defendant is remanded to the custody of the United States Marshal.

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION
No. 00 C 6078

UNITED STATES OF AMERICA

v.

ROBERT KRILICH (94 CR 419).

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that Krilich's § 2255 motion to vacate, modify, or correct his sentence is denied. Defendant to take nothing. All matters in controversy having been resolved, final judgment is hereby entered in favor the United States of America and against Robert Krilich.

Michael W. Dobbins, Clerk of Court
Stephen C. Tokoph, Deputy Clerk
Date: Jun 4, 2002

ORDER

This matter is before the court on Petitioner Robert Krilich's motion to vacate, modify, or correct his sentence pursuant to 28 U.S.C. § 2255. For the reasons set forth below, the motion is denied.

This case has a long and tortuous history. Krilich has been sentenced on three separate occasions for his September 1995 conviction for racketeering and other related offenses. He has filed four appeals, the last of which is still pending, and his is his second go-round before this court on a § 2255 petition. The first, which we decided on April 2001, focused on his first sentencing. He now seeks to challenge the second and third sentencing on three grounds: the sentencing judge had no jurisdiction to make certain findings in ruling on a posttrial motion; the amount of forfeiture imposed upon him; and a claim that the sentencing guideline applied to his offense was not in effect when his crimes were committed, making its use a violation of the ex post facto clause of the Constitution.

Krilich raised his ex post facto argument in his second appellate brief but contests that the Seventh Circuit did not address the issue in its opinion. The text of the opinion does not directly examine whether the application of the sentencing guideline was constitutionally impermissible. Instead, the court of appeals noted that Krilich launched several different attacks on his sentence and dealt with the only one they felt needed further analysis: the calculation of his gain. *United States v. Krilich*, 257 F.3d 689, 691-92 (7th Cir. 2001). The overall impression of this passage is that the court concluded that the other challenges did not hold sufficient merit to warrant discussion. In other words, the issue has been raised and considered on direct appeal, making it unsuitable as a basis for a Sec. 2255 petition unless Krilich can demonstrate changed circumstances. *Norris v. United States*, 687 F.2d 899, 900 (7th Cir. 1982).

Even assuming that the Seventh Circuit did not consider his ex post facto claim, we independently conclude that it is without merit. The guideline in effect at the time Krilich committed his offenses does not use the exact phrase "loss to the government" that was added to later versions. Compare U.S.S.G. § 2C1.1 (a)(2)(A) (2001) with U.S.S.G. § 2C1.1(a)(2)(A) (1990). Instead, the older- section refers to value, benefit, or benefit to be received from the illegal activity. Krilich cannot argue that his activities would have only resulted in a loss to the government without conferring a commensurate benefit to him or intended to be received by him, placing him solidly within this section of the guidelines and leading to the table the sentencing judge used to compute the offence level increased based on the amount of the loss effected by the defendant's actions. U.S.S.G. § 2F1.1 (1990). Although the former wording of the guideline is not as specific as the current version, it is clear that Krilich was within the ambit of the previous guideline's substance, and the textual changes do not implicate ex post facto protections.

The remaining grounds Krilich brings up are not based in the Constitution, and he did not raise them during his direct appeal. This failure precludes their resolution by this court. *Bontkowski v. United States*, 850 F.2d 306, 313 (7th Cir. 1988). Finally, we acknowledge the last-ditch effort in Krilich's reply to raise an ineffective assistance of counsel claim only to note its frivolousness; because the application of the earlier guideline does not violate Krilich's constitutional rights, counsel was under no obligation to alert him of the different working of the two guidelines.

Based on the foregoing, Krilich's Sec. 2255 motion to vacate, modify, or correct his sentence is denied.

Charles P. Kocoras U.S. District Judge
Dated: Jun 4, 2002

No. 02-1445
United States Court of Appeals
For the Seventh Circuit

ROBERT R. KRILICH, SR.,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 94 CR 419 David H. Coar, Judge

Submitted September 11, 2002*
Decided December 31, 2002

Before

Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. TERENCE T. EVANS, Circuit Judge

ORDER

This is the fourth appeal we have considered in a criminal prosecution commenced eight years ago. The last time the case was here, we concluded that the evidence did not warrant any reduction in sentence under U.S.S.G. § 5H1.1 or § 5H1.4. After resolving other contentions, we remanded the case to

the district court with instructions to impose a sentence in the range of 135 to 168 months. *United States v. Krilich*, 257 F.3d 689, 694 (7th Cir. 2001). The district court held a hearing to select an appropriate sentence from this range. The final sentence, at 135 months, is the most favorable outcome that our mandate permits. Yet Krilich has appealed again, arguing that his sentence should have been lower.

Our remand did not permit the presentation of evidence or legal theories supporting a different range. The lawful range had been established on the basis of evidence and arguments presented during multiple evidentiary hearings and appeals. We held that a sentence must be imposed from the range 135-168 months. That decision became final when the Supreme Court denied Krilich's petition for certiorari. 122 S. Ct. 1175 (2002). New arguments presented after a decision of the kind we rendered do not justify departure from the mandate. See *Barrow v. Falck*, 11 F.3d 729 (7th Cir.1993). A change of law after the rendition of an appellate opinion sometimes justifies revisiting decided issues, but Krilich does not point to any favorable change of law. Consequently the district judge had no authority to impose a sentence lower than the one Krilich received.

AFFIRMED

Footnote

*This appeal has been submitted under Operating Procedure 6(b) to the panel that decided prior appeals

in the case. The panel has concluded that additional oral argument is unnecessary.

No. 02-3161
United States Court of Appeals
For the Seventh Circuit

ROBERT R. KRILICH, SR.,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee

Appeal from the United States District
Court for the Northern District of
Illinois, Eastern Division
No. 94 CR 419 Charles P. Kocoras, Chief Judge

Submitted December 6, 2002*
Decided December 31, 2002

Before

Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. TERENCE T. EVANS, Circuit Judge

Order

Robert Krilich has been sentenced three times following his criminal convictions for bank fraud and operating an enterprise through a pattern of racketeering. The convictions have been affirmed, but the first two sentences were vacated, see 159 F.3d 1020 (1998), and 257 F.3d 689 (2001); the third is affirmed by an order issued today. Krilich sought collateral review

of the first sentence. That petition was denied by the district court, and we declined to issue a certificate of appealability. Now we have Krilich's collateral attack on his second sentence. What significance this could have is unclear, given that the second sentence was vacated more than a year ago. But the district court denied this petition on the merits, and Krilich seeks a certificate of appealability.

The district court should not have entertained Krilich's request. It is his second collateral attack and therefore required this court's approval under 28 U.S.C. §2255 Par. 8. Krilich did not seek permission to file, and the argument he presents-that the court violated the Constitution's Ex Post Facto Clause by considering, when imposing sentence, the loss inflicted by his offenses-does not meet the statutory criteria for a second or successive collateral attack. Krilich's lawyers may believe that §2255 Par. 8 does not apply because he has been sentenced more than once. But we held in *Dahler v. United States*, 259 F.3d 763 (7th Cir. 2001), that resentencing resets the counter for purposes of §2255 Par. 8 only if the collateral attack concerns an issue that first arises at the resentencing. Krilich's argument, by contrast, has been in the case all along. His application for a certificate of appealability opens by saying that "[t]his is the eighth time the petitioner has attempted to have his ex post facto constitutional claim addressed by a federal court." It was raised on Krilich's initial appeal to this court, and it was resolved then. We did not discuss it, but we considered all arguments presented, and a court of appeals is not obliged to discuss weak contentions. So this collateral attack is Krilich's second, which does not have (and could not receive) approval under §2255 Par. 8.

The judgment of the district court is vacated, and the matter is remanded with instructions to dismiss for want of jurisdiction. See *Nunez v. United States*, 96 F.3d 990 (7th Cir. 1996).

Footnote

*This appeal has been submitted under Operating Procedure 6(b) to the panel that decided prior appeals in the case. The panel has concluded that additional oral argument is unnecessary.